

THE HOPI TRIBE  
v.  
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 89-148

Decided March 14, 1989

Petition for discretionary review of order of Administrative Law Judge dismissing appeal from approval of certain surface mining permits.

Petition for discretionary review granted.

1. Surface Mining Control and Reclamation Act of 1977: Federal Lands: Permits--Surface Mining Control and Reclamation Act of 1977: Permits: Approval

The regulations at 43 CFR 4.1360 through 4.1369 govern proceedings on review of approval or disapproval of applications for new surface mining permits on Federal lands and Indian lands. Any order or decision of an administrative law judge disposing of a permit review proceeding is subject to review only pursuant to a petition for discretionary review filed with the Board within 30 days of receipt of the decision under the regulation at 43 CFR 4.1369(a).

APPEARANCES: Mark Squillace, Esq., Laramie, Wyoming, and Michael O'Connell, Esq., Kykotsmovi, Arizona, for The Hopi Tribe; Cheryl L. Smout, Esq., Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; and James R. Bird, Esq., Washington, D.C., for Peabody Coal Company.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Hopi Tribe (Tribe) has filed a "notice of appeal," citing the regulation at 43 CFR 4.1270, from the decision of Administrative Law Judge Harvey C. Sweitzer dismissing its appeal from approval of certain surface mining permits. Counsel for Peabody Coal Company, intervenor herein, and for the Office of Surface Mining Reclamation and Enforcement (OSMRE) have objected to the Tribe's "notice of appeal" in this case, asserting that the sole available avenue for relief from the decision of the administrative law

judge in this case is a petition for discretionary review under the regulation at 43 CFR 4.1369. 52 FR 39528 (Oct. 22, 1987). Peabody and OSMRE have also objected to the petition for discretionary review and urged that, in the event the petition for review is granted, further briefing should be barred as contrary to the time limits set forth in 43 CFR 4.1369. By order dated February 3, 1989, this Board noted the objection to the brief filed on behalf of the Tribe on January 17, 1989, and allowed an extension of time to respond to the brief until 20 days after receipt of the Board's order ruling on the objections.

[1] The regulations at 43 CFR 4.1360 through 4.1369, 52 FR 39527-39528 (Oct. 22, 1987), effective November 23, 1987, govern review of approval of applications for new surface mining permits on Federal lands and Indian lands. The regulation at 43 CFR 4.1369(a) provides that any party aggrieved by a decision of an administrative law judge granting a permit may file a petition for discretionary review with the Board within 30 days of receipt of the decision. The regulation further provides that any party may file a response to a petition for discretionary review within 20 days of receipt of the petition. 43 CFR 4.1369(b).

The decision of Judge Sweitzer did not actually grant the permits in question. <sup>1/</sup> As pointed out by counsel for the Tribe, Judge Sweitzer did not address the merits of the permit decisions, rather he disposed of the case by order on procedural grounds. Under the circumstances, counsel for the Tribe argue that a petition for discretionary review under 43 CFR 4.1369 is inappropriate. Therefore, counsel styled the original filing as a "Notice of Appeal." They explain that under 43 CFR 4.1271 any aggrieved party may file a notice of appeal from an order of an administrative law judge disposing of a proceeding under 43 CFR Subpart L. However, they do argue in the alternative, that if the Board determines that a petition is proper, that we consider the notice of appeal as a petition for discretionary review.

The interpretation of the procedural regulations espoused by counsel for the Tribe is not without merit; nevertheless, the intent of the regulations in 43 CFR 4.1360-69 is to guide the administrative review process for permit approval or disapproval. Therefore, we believe the proper interpretation is that any order or decision of an administrative law judge disposing of a permit review proceeding is subject to review only in accordance with 43 CFR 4.1369.

Petitioner's "notice of appeal" cited as grounds for review the "arguments in the record before Judge Sweitzer" and requested 30 days to file a brief in support of review. OSMRE filed a response opposing the extension

<sup>1/</sup> The permits involved in this case were previously the subject of a Board decision in Peabody Coal Co. v. The Hopi Tribe, 91 IBLA 59 (1986). That decision was the subject of judicial review, and the court remanded the matter to the Department. Peabody Coal Co. v. United States, CIV 86-502 PCT CLH (D. Ariz. Mar. 11, 1988). Judge Sweitzer's order issued as a result of that remand.

for briefing on the ground it would render the appeal untimely under 43 CFR 4.1369. Peabody objects to the petition as defective for failure to contain a statement of the grounds of alleged error in the administrative law judge's decision as required by 43 CFR 4.1369 and urges that the petition be denied.

We find it appropriate in the context of this case to consider the "notice of appeal" as a petition for discretionary review. We find that it satisfies the procedural requirements of 43 CFR 4.1369 and, in the interest of allowing consideration of the arguments raised by petitioner and the response of Peabody and OSMRE thereto, we grant the petition for review.

In view of the fact that a brief on behalf of petitioner has already been filed herein and served on the parties, any delays associated with the receipt of this brief and allowing a response thereto by OSMRE and Peabody should be minimal. Accordingly, the brief filed on behalf of petitioner is allowed and, hence, pursuant to our prior order herein, OSMRE and Peabody are allowed 20 days from receipt of this order to file a responsive pleading. It is the intent of the Board to review this matter expeditiously in the interest of bringing the extended administrative proceedings in this matter to a close.

C. Randall Grant, Jr.  
Administrative Judge

I concur:

Bruce R. Harris  
Administrative Judge